Supreme Court, U.S.
FILED
FEB 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-974

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

KIAMICHI AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT NO. 7,
Petitioner,

v.

JOHNNY S. SHORT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

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BRIEF IN OPPOSITION

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12 pp

QUESTIONS PRESENTED

1. Where the decision of the Oklahoma Supreme Court gave no relief to respondent, and a reversal of the ruling challenged in the Petition for Certiorari would not affect the rights of the litigants, does a case or controversy exist within the meaning of Article III? If so, is the case in a proper adversarial posture for review by this Court, inasmuch as respondent has no interest in defending the decision as it stands?

2. If the answers to the preceding questions are yes, does the decision of the Oklahoma Supreme Court warrant review by this Court, where the decision merely defines the point in Oklahoma's procedures for nonrenewal of a tenured teacher's contract at which notice and an opportunity to respond must be provided in order to afford the teacher a meaningful opportunity to invoke the discretion of the decisionmaker, as required by this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)?

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BRIEF IN OPPOSITION

Respondent Johnny S. Short submits this brief in opposition to the Petition for Certiorari filed by Kiamichi Area Vocational-Technical School District No. 7.

STATUTES INVOLVED

The provisions of Okla. Stat. tit. 70, §§ 6-103.4-.13 are set out in the appendices to the Petition for Certiorari ("Pet. App.") at 18a-25a.

STATEMENT OF THE CASE

Respondent Johnny Short was a tenured teacher employed by petitioner Kiamichi Area Vocational-Technical School District No. 7 ("School District"). On April 1, 1985, without having afforded Short any notice or opportunity to be heard, the Board of Education of the School District made a decision not to renew Short's teaching contract for the upcoming 1985-86 school year on the ground of "willful neglect of duty," due to the fact that Short had not secured certification as an electronics instructor. Pet. App. 3a, 5c. Whether Short had been informed in timely fashion of the need to obtain this certification, and whether the circumstances of his failure to obtain the certification were such as to amount to willful neglect of duty, are strongly disputed. *See id.* at 3a, 7a. On April 2, 1985, the Board informed Short of its decision by certified mail. *Id.* at 3a.

Although Short never was afforded any opportunity to be heard by the *School District*, under Oklahoma law he had the right to appeal the School District's action before a Hearing Panel chaired by an independent hearing judge selected from a list prepared by the State Superintendent of Public Instruction. *See* Okla. Stat. tit. 70, § 6-103.4-.13. The Oklahoma statute provides that the Hearing Panel is to issue a report, which must satisfy the following requirements:

> The report shall contain an outline of the scope of the hearing, findings of fact and conclusions of law and shall direct either of the following:
>
> 1. That the local board of education *reinstate* the tenured teacher with full employment status and benefits; or
>
> 2. *That the decision* of the local board of education for the dismissal or nonreemployment of the tenured teacher *be sustained* [§ 6-103.11(B) (emphasis added)].

In Short's case the hearing judge was selected in May 1985, the hearing was held on June 24 and 25, 1985, and the panel's decision was issued on August 1, 1985. Pet. App. 1c, 7c. The decision of the Hearing Panel was "that the action of the School Board on April 1, 1985, relative to Johnny Short is hereby UPHELD." *Id.* at 7c.

Short appealed the Hearing Panel's decision to the district court of Choctaw County in accordance with the provisions of Okla. Stat. tit. 70, § 6-103.12. The district court entered an order affirming the decision of the Hearing Panel. Pet. App. 1b-2b.

On appeal of the district court's decision, the Oklahoma Supreme Court held that the Oklahoma statutory scheme falls short of the requirements of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), in that it provides for notice and an opportunity to be heard only *after* a school district has made the decision to nonrenew a tenured teacher's contract. While recognizing that a "full evidentiary proceeding" need not be provided prior to the school district's action, the Oklahoma Supreme Court stated that to comply with *Loudermill*, "a pretermination opportunity to respond" must be afforded. Pet. App. 10a.

Although Short had not been afforded such an opportunity, the Oklahoma Supreme Court did not provide him with any relief. Instead, the court declared that its "pronouncement [would] be given purely prosepective effect," *id.* at 13a, and would not apply to Short's own case, *id.* at 12a. As the basis for that disposition, the court stated that "[a]t the time Short's contract was nonrenewed, *Loudermill* had been promulgated for only two weeks. Therefore the school board may not have known that a pretermination hearing was required. . . ." Pet. App. 12a.

The School District petitioned this Court for a writ of certiorari. Subsequently, Short filed a Cross-Petition, docketed as No. 88-1148, presenting the question whether

the Oklahoma Supreme Court's refusal to apply *Loudermill* in Short's case violates the Supremacy Clause. However, in the Cross-Petition Short stated that he does not wish to continue this litigation, and he urged the Court to deny the School District Petition, acknowledging that this would in turn preclude the granting of Short's Cross-Petition. *See* Cross-Petition at 6-7, citing Supreme Court Rule 20.5.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Present a Case or Controversy Within the Meaning of Article III; and the Case is Not in Any Event in a Proper Adversarial Posture for Review by This Court.

As noted, the decision of the Oklahoma Supreme Court provided no relief whatever to Short. He therefore has no interest in defending that decision as it stands.[1] In these circumstances, there is a strong argument that the Court lacks jurisdiction to entertain the School District's petition because there is no case or controversy as required by Article III.

"[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974), quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).[2] Largely for that reason, it is the almost invariable practice of this Court, even when it determines that a newly declared rule of law should be applied only prospectively, to apply the rule to the parties in the case

[1] Short would, however, have an interest in the case if the Court were to grant his Cross-Petition for Certiorari, as it would then be possible for him to seek relief. But, as stated, Short would prefer that both petitions be denied.

[2] This is true even if the case is brought up from a state court that had jurisdiction as a matter of state law, and even if state law would continue to view the matter as justiciable. *DeFunis*, 416 U.S. at 316.

in which the rule is announced. *See* generally *Griffith v. Kentucky*, —— U.S. ——, 107 S. Ct. 708, 715-16 (1987). Of prime importance here, the Court has described this practice as "*rooted in the command of Article III* that [the Court] resolve issues solely in concrete cases or controversies. . . ." *Stovall v. Denno*, 388 U.S. 293, 301 (1967) (emphasis added). *See also Griffith v. Kentucky, supra*, 107 S.Ct. at 713; *Simpson v. Union Oil Co.*, 396 U.S. 13, 14 (1969). *But see Linkletter v. Walker*, 381 U.S. 618, 622 n.3 (1965) (questioning whether the Court is invariably "prevented by Article III from adopting the technique of purely prospective overruling"). We therefore submit that as a result of the Oklahoma Supreme Court's refusal to apply its construction of *Loudmill* in Short's own case, no case or controversy is presented by the School District's petition. Put simply, this Court's reversal of the ruling that is challenged by the School District "[would not] affect the rights of litigants in the case before [the Court]." *DeFunis*, 416 U.S. at 316.

But in determining whether certiorari should be granted, there is no need to reach a firm conclusion with respect to this Article III question. It is enough to recognize that if the School District petition were granted, this Court would be presented with a proceeding in which the respondent has no practical interest in the outcome.[3] We respectfully submit that this consideration militates strongly against granting the School District's petition.

II. The Issue Presented Does Not Merit Review By This Court.

The School District's contention is that the Oklahoma Supreme Court should have determined that "*Loudermill* is . . . distinguishable" from this case, Petition for Certiorari at 12, because, according to petitioner, the termination of Short's employment did not "take[ ] effect

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[3] As we have acknowledged, this problem will not exist if Short's cross-petition is granted as well. See *supra* note 1.

and become[ ] final" until after a hearing had been provided. *Id.* This argument is based on the fact that Short taught for the 1984-85 school year, and then received a hearing from the Hearing Panel before the 1985-86 school year began.[4] Petitioner contends that it is the decision of the Hearing Panel, rather than the decision of the School District, that constitutes the "termination" which, under *Loudermill*, must be preceded by notice and an opportunity to respond. *See* Petition at 12-13.

However, the court below did not misapply *Loudermill* in concluding that under the Oklahoma procedures, the constitutional requirement of notice and an opportunity to respond comes into play at the point at which the *school district* is deciding whether to nonrenew a tenured teacher's contract.

The statute itself states that if the Hearing Panel does not sustain the decision of the local board of education, the panel shall direct the local board to "*reinstate* the tenured teacher . . .," Okla. Stat. tit. 70, § 6-103.11(B) (emphasis added). This certainly implies that in the contemplation of the statute, the decision of the school district operates in and of itself to terminate the teacher's employment.

But the application of *Loudermill* does not in any event turn on whether the process of termination has reached its final point before notice and an opportunity to respond are provided. One of the key considerations underlying the requirement in *Loudermill* of a pretermination hearing is that a hearing must be provided when there is still a "meaningful opportunity to invoke the discretion of the decisionmaker." Loudermill, 470 U.S. at 543. *See also id.* at 544 (noting that if Loudermill

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[4] Short did not, however, receive a *decision* from the Panel until after the July 1 commencement of the fiscal year, which is the point at which his contract for 1985-86 (albeit not his pay for that year) would gone into effect had the School District not determined to nonrenew his contract.

had been allowed a pretermination hearing, "a fully informed decisionmaker might . . . have exercised its discretion and decided not to dismiss him notwithstanding its authority to do so"). In Oklahoma it is the *employer—i.e.*, the *school district*—that has the discretion to determine whether a teacher who arguably *could* be terminated *should* be terminated. *See* generally Okla. Stat. tit. 70, § 5-117A(14) (granting to the board of education of each local school district the power to operate and manage the schools, including the power to contract with teachers and to fix their terms of employment). The role of the Hearing Panel is not to exercise discretion, but simply to determine whether the school district's action can be "sustained." Okla. Stat. tit. 70, § 6-103.11(B). Thus, it is fully consistent with *Loudermill* to hold that notice and an opportunity to respond must be provided before the public *employer*, in this case the local school board, decides to terminate an employee, and that it is not enough to provide a hearing before a reviewing body after that decision has been made.

But there is no need to belabor the point, because "[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment [the Court is] asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). *See* Supreme Court Rule 17. Petitioner has offered nothing to indicate that the question it seeks to present to the Court is of sufficient importance to merit review. The question turns in large part on the particular procedures followed in one state, and petitioner does not claim that the decision of the Oklahoma Supreme Court conflicts with that of any other state or federal court. Nor does the decision work any harsh result. *Cf. Montana v. Kennedy*, 366 U.S. 308, 309 (1961) (granting certiorari "in view of the apparent harshness of the result entailed"). This Court has recognized that a requirement of notice and an

opportunity to respond "impose[s] neither a significant administrative burden nor intolerable delays," *Loudermill*, 470 U.S. at 544; and the decision of the Oklahoma Supreme Court merely defines the point at which Oklahoma school districts must in the future provide those rudimentary procedures of due process.

Thus, even if there were reason to question the correctness of the decision below (*but see supra* at 6-7), and even if a live case or controversy existed (*but see supra* at 4-5), the question presented by the petition for certiorari would not warrant inclusion in this Court's crowded docket.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.[5]

Respectfully submitted,

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[5] If the petition is denied, Short's cross-petition will necessarily be denied as well, *see* Supreme Court Rule 20.5, and the litigation will be at an end. But if the Court grants the School District petition, it should also grant Short's cross-petition, for the reasons stated herein and in the cross-petition.